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Salt Lake City v. State of Utah : Brief of Appellant

Utah Supreme Court

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6376

In the Supreme Court of the State of Utah

SALT LAKE CITY, a municipal corporation,
Respondent,
vs.
STATE OF UTAH,
Appellant.

No. 6376

APPELLANT'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF UTAH IN AND FOR SALT LAKE COUNTY

HONORABLE BRYAN P. LEVERICH, JUDGE

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STATEMENT OF THE CASE

This is an appeal taken by the Defendant and Appellant from a judgment rendered in favor of the Plaintiff and Respondent by the District Court of Salt Lake County.

The action was brought by the Plaintiff, Salt Lake City, a municipal corporation, to quiet title to a certain

parcel of real property in Salt Lake City, County of Salt Lake, State of Utah, particularly described as follows:

> All of lots eight (8), nine (9) and ten (10), in Block 2, Plat "K", Salt Lake City Survey.

The property above described was conveyed to the State of Utah by Salt Lake City on or about the 9th day of July, A. D., 1895, in an indenture which is set forth at page 17 of the Abstract of the Record and is as follows:

> "This Indenture made the ninth day of July, A. D. 1895, between Salt Lake City, a municipal corporation in the Territory of Utah, the party of the first part, and the Territory of Utah, the party of the second part, witnesseth:
>
> "That whereas Salt Lake City a municipal corporation in the Territory of Utah the Grantor herein is the owner of the real estate and property hereinafter fully described, and whereas, the said City has agreed to convey the said property to the Territory of Utah, on the conditions and for the purposes set forth in the following report of a special committee of said City Council, duly appointed by said Council and the action of said Council on said report, to-wit:
>
> "Your Special Committee to confer with the Governor and the Legislative Assembly to provide for the transfer of certain land to the Territory of Utah one acre of ground on the east side of State Street and immediately south of the Capitol Grounds and in such shape as may be acceptable

to the Territory, said ground to be used for the site of Executive Mansion.

"We also recommend that the deed of said site carry with it the free use of City water for the grounds and Mansion.

Respectifully submitted

M. K. Parsons
James Anderson
W. P. Lynn

"On motion of Councilman Pendleton, the report was adopted and the Mayor given authority to sign the deed, under the conditions specified.

"Roll call on vote stood as follows: Ayes:

"Councilman Parsons, Pendleton, Spafford, Anderson, Pickard, Heath, Hyde, Folland, Farrick, Lynn and James."

AND, WHEREAS: the Legislative Assembly of the Territory of Utah adopted a joint resolution accepting said property upon the conditions and for the purposes, as specified in the report of the said Special Committee and the action of the City Council of said Salt Lake City on said report now therefore, in consideration of the premises, and the sum of One Dollar in hand paid by the said second party, the receipt whereof is hereby acknowledged; and by these presents does grant, bargain, sell, convey and confirm unto the said Territory of Utah, the party of the second part, the following described real estate and property, to-wit:

"All of Lots eight (8) nine (9) and ten (10) in Block two, Plat "K" Salt Lake City Survey the same being situated and lying in Salt Lake City, and County, Territory of Utah, and also a sufficient supply of water for use on said premises and any building or buildings that may hereafter be erected thereon free of cost to the party of the second part, so long as said premises shall be used for a mansion or residence by the Executive of said Territory, or the State of Utah.

"But in case said property shall not be used by said Territory or State for an Executive Mansion or residence, then this deed shall become void and of no effect and said property with all the improvements and appurtenances thereon or thereto belonging shall revert to and become the property of the said party as fully and absolutely as if this deed had not been made.

"IN WITNESS WHEREOF, the said Salt Lake City by its Mayor, R. N. Baskin has hereunto signed and caused the Seal of Salt Lake City to be hereunto affixed in pursuance of the foregoing report of said Special Committee and the resolution of the City Council of Said City adopting said report.

Salt Lake City
By R. N. BASKIN
Mayor.

Signed in Presence of

Attest: W. A. McKay
G. H. Backman City Recorder

SALT LAKE CITY SEAL"

A certified copy of the above Indenture was received in evidence by the Court and marked Plaintiff's Exhibit "C."

The Court also received in evidence Plaintiff's Exhibit "A" as indicated in the exhibit list at page 21 of the record and which is an Indenture by and between Jennie J. Kearns, widow of Salt Lake City, State of Utah, party of the first part, and the State of Utah, the party of the second part, wherein Jennie J. Kearns conveyed a certain parcel of real property situated in Salt Lake City, and the dwelling house located thereon, unto the State of Utah; this gift was accepted by the State pursuant to a legislative act known as Senate Bill Number 236, Chapter 151, Laws of Utah, 1937. The act recited that the Jennie J. Kearns' property was to be used as a residence for the Governor.

In view of the provisions in the deed between the City and the State which is as follows:

> "But in case said property shall not be used by said Territory or State for an Executive Mansion or residence, then this deed shall become void and of no effect and said property with all the improvements and appurtenances thereon or thereto belonging shall revert to and become the property of the said party as fully and absolutely as if this deed had not been made."

and the evidence offered by the City that the State had accepted other property as a residence for the Governor, the court below rendered its decision in favor of the Plaintiff City and that decision is the subject of this appeal.

STATEMENT OF ERRORS

1. The court erred in making and entering its finding of fact numbered 6, (page 26, Record), to-wit:

> "That the said defendant State of Utah abandoned the use of said real property conveyed to it by Salt Lake City for an executive mansion or residence as aforesaid and by the acceptance of the said real property conveyed to it by Jennie J. Kearns as aforesaid and the use by the State of Utah as its executive mansion or residence for its Governor did terminate its fee in the deed conveying the real property from Salt Lake City plaintiff to the State of Utah as aforesaid,"

for the reason that the finding is based on the fact that the State had accepted the Jennie J. Kearns' property to be used as a governor's mansion, and said finding is contrary to law.

2. That the Court erred in making its conclusion of law, numbered 1, (page 26, Record) as follows, to-wit:

> "That by reason of the State of Utah defendant accepting the land described in the conveyance by Jennie J. Kearns to the State of Utah and recorded in Book 198 of Deeds, pages 470-1, in the office of the County Recorder of Salt Lake County

and dated April 28, 1937, pursuant to Chapter 151, Laws of Utah, 1937, the said real property described in the deed from the plaintiff Salt Lake City to the defendant State of Utah dated July 9, 1895, conveying Lots 8, 9 and 10, Block 2, Plat 'K,' Salt Lake City Survey, has reverted to and become the property of the plaintiff Salt Lake City."

3. That the Court erred making the following judgment, (page 28 of the Record), to-wit:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff herein, Salt Lake City, is the owner of that certain lot or parcel of land situated, lying and being in the County of Salt Lake, State of Utah, and bounded and described as follows, to-wit:

"2. That the defendant State of Utah has no interest or estate in said land or any part thereof and that the title of the plaintiff in and to said real property is good and valid.

"3. That the defendent State of Utah is hereby forever enjoined and debarred from asserting any claim whatever in and to said land or premises."

ARGUMENT ONE

THE INDENTURE CONVEYING THE PROPERTY TO THE STATE OPERATED TO CONVEY TO THE STATE OF UTAH A BASE FEE OR FEE DETERMINABLE SUBJECT TO A SPECIAL LIMITATION

WITH A POSSIBILITY OF REVERTER IN FAVOR OF THE CITY AS GRANTOR.

The deed in question states therein:

> "But in case said property shall not be used by said territory or state, for an Executive Mansion or residence then this deed shall become *void and of no effect.* * * *" (Italics added)

Such a deed provides for termination of the estate of the grantee by operation of law, not by act of the parties, and, therefore, the estate granted to the State of Utah is a fee determinable with a special limitation. A "base" fee or a fee determinable terminates upon a special limitation; that is to say, that the State of Utah has ownership of the property with all the attributes of a fee simple estate which will be determined upon the happening of a certain event; it is subject to one special limitation and that limitation alone. The city as grantor by such a deed reserved unto itself a *mere possibility* of reverter. Reference may be made to "Restatement of the Law of Property" wherein in Section 23 a definition of the term "special limitation" is set forth:

> "The term 'special limitation' denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest."

Note (b) of Section 23 specifies:

> "Automatic expiration consists, historically, in the ending of an interest in accordance with the terms of its creating limitations."

The courts have recognized that such an estate may be created. Reference may be made to the case of Yarborough vs. Yarborough, 151 Tenn. 221; 269 S. W. 36, where the court devotes much of the opinion to an analysis of the characteristics of such an estate and states:

> "There remains the question as to whether the estate attempted to be created by the conveyancy before us was an estate upon condition or an estate upon conditional limitation.
>
> "The distinction between an estate upon condition and a conditional limitation is thus drawn by Mr. Washburn:
>
> " 'In this and many other respects, an estate upon condition, properly speaking, differs from what is known as a conditional limitation. In either case, the estate is a conditional one. But in the one, though the event happen upon which the estate may be defeated, it requires some act to be done, such as making an entry, in order to effect this. In the other, the happening of the event is, in itself, the limit beyond which the estate no longer exists, but is determined by the operation of the law, without requiring any act to be done by any one. In case of a condition at common law, the grantor or his heirs alone can defeat the estate by

> entry for condition broken. In a conditional limitation, the estate determines, ipso facto, upon the happening of the event, and goes over at once to the grantor by reverter, or to the person to whom it is limited upon the happening of such contingency.' "

See also 296 N. Y. Sup. 341, page 350, and 77 A. L. R. 345, (Note 2); 51 A. L. R. 1466 and 1473.

ARGUMENT TWO

THAT THE STATE HAD ABANDONED THE PROPERTY WAS AN ERRONEOUS FINDING OF FACT.

The finding of the court below that the appellant herein had abandoned the use of the property conveyed to it by the respondent, and that the fee of the appellant terminated upon the acceptance of the Kearns' property was not supported by competent evidence which could justify such a finding and is contrary to law.

It is well settled that an abandonment is the intentional relinquishment of a known right, and that an abandonment cannot give title to any other person or party, but merely throws the property open to the public domain. See Del Giorgio vs. Powers, 27 Cal. App. (2d) 668, 81 Pac. (2d) 1006.

In Thompson on Real Property (Perm. Ed.) Vol. 5 P. 310, Section 2566, it is stated:

"The characteristic element of abandonment is the voluntary relinquishment of ownership. It depends on an intention to abandon or relinquish, coupled with some overt act or some failure to act, which carries the implication that the owner neither claims nor retains any interest in the subject-matter of the abandonment. In order to justify the conclusion that there has been abandonment of property, there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership thereof. It must be remembered that intent to relinquish ownership is a material element in abondonment. * * *"

See also Kimberlin vs. Hicks, 150 Kan. 449, 94 Pac. (2d) 335, at 338, wherein the court stated:

"It was alleged that Eli abandoned his right to use the real estate on or about August, 1937, and moved to a town; that he made application for old age assistance in which he stated that he did not own, and had no interest in, any real estate. It is argued that his interest in the real estate was extinguished by abandonment and that the interest of the remaindermen was accelerated.

"In 1 C. J. S., Abandonment. Vol. 1, page 4, abandonment is defined: 'Abandonment of property or a right is the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession and control, and without vesting ownership in any other person.'

"A title in fee simple cannot be lost by mere abandonment; Barrett vs. Coal Co., 70 Kan. 649, 79 P. 150, and abandonment is not usually men-

tioned as a methed by which a life estate may be extinguished, Restatement, Property, Section 152; 21 C. J. 969. In Spencer vs. Smith, 74 Kan. 142, 145, 85 P. 573, it is stated that as a general rule title to land cannot be lost by abandonment."

ARGUMENT THREE

CONSTRUCTION OF A DEED MUST BE MOST FAVORABLE TO THE GRANTEE AND FORFEITURES ARE NOT FAVORED.

In construing a deed, the grant must be construed most favorably to the grantee. See Blackman vs. Striker, 142 N. Y. 55, 560 N. E. 484.

In construing a deed forfeitures are not favored. Therefore, in analyzing the deed from the City to the State, we must do so in accordance with the long established basic doctrines, that forfeitures are not favored, but abhorred in the law. Van De Bogart vs. Reformed Dutch Church of Poughkeepsie, 219 Appellate Div. 225; 220 N. Y. Sup. 58; 115 N. Y. 361; 22 N. E. 145; 5 L. R. A. 422; 12 American State Rpts. 809.

The importance of forfeitures is none the less because a deed was given without consideration. See 116 A. L. R. 67.

From the foregoing long established rules of law concerning the construction of deeds, it is the contention of appellant that the court must lean toward the con-

struction most favorable to the grantee. That is, it must not only be aware of the deed, but also that should it uphold the verdict of the court below the appellant will suffer a forfeiture. The court must, therefore, make a reasonable search for any reason, with regard to both the facts and the law which would give it grounds to defeat the forfeiture.

ARGUMENT FOUR

THE POSSIBILITY OF REVERTER IN FAVOR OF RESPONDENT MAY ONLY ARISE BY MISUSER AND NOT BY NON-USER.

The court below made its conclusion of law to the effect that the property in question had reverted to and become the property of the respondent city upon the acceptance by the State of the property of Jennie J. Kearns; this was undoubtedly based upon the erroneous conclusion that since the State had not made use of the property for a Governor's Mansion and had accepted by legislative act a gift of another portion of property to be used for the home of the Governor, that this fact gave rise to the possibility of reverter outlined by the special limitation clause in the deed. That is to say, that when the State acquired a Governor's Mansion, that it would no longer use the property that was given to it by the city. It is the contention of appellant that the possibility of reverter in the city may not arise until the State of Utah uses the property for some other purpose than a Governor's Man-

sion. This contention is confirmed and substantiated by the fact that the deed recites:

> "But in *case* said property s h a l l n o t be used * * *"

This can only be construed as meaning some time in the future with no definite limitation. Reference may be made to Vol. 6, "Words and Phrases," (Perm. Ed.), p. 213,

> " 'A case' in ordinary parlance is that which follows, comes, or happens; or an event."

The city councilmen and the mayor who executed the deed knew, and must have anticipated the fact, that there might be a considerable passage of time before the State of Utah could build a suitable home for the executive. The deed confirms this in expressing:

> "But in case said property shall not be used by said *territory* or the *State* for an executive mansion or residence * * *" (Italics added)

Surely the framers of this deed, executed at the time Utah was a territory, must have intended that some time would pass before use of the property could be made properly because the deed itself included reference to both territory and state. The fact that the State of Utah recently accepted a gift of a home to be used as the Governor's Mansion is not proof or worthy evidence that the State does not intend to use the property as shown in

Exhibit "C" for the purposes to which said conveyance is limited. The residence now used by the Governor may be vacated at some immediate future time, and as long as the State of Utah has not used or attempted to use the property which is the subject of this action for any other use, the possibility of reverter may not arise in the city.

In the case of McKissick vs. Pickle, 16 Pa. St. Rep. 140, an individual granted and conveyed a lot of ground to certain persons in trust, upon which erection of a school house, and house of public worship was to take place for the benefit of the public; the deed providing that should the property be converted into any other use other than a school house and a building for education of youths, and a meeting-house for promulgating the gospel, and also a burying-ground, and such other improvements as may be advantageous and of use to the promotion of the aforesaid three objects, that then and in that case, the said lot shall revert to the party of the first part and to his heirs and assigns. There was competent evidence presented to the court that for many years no school had been taught in the building nor had any religious services been conducted. The court in construing this deed used the following language:

> "The proviso in the deed is entitled to a fair, liberal, and benign interpretation, not according to its letter, but its spirit. Viewing it in this aspect, I cannot bring myself to believe that it was in the contemplation of the parties (the grantor and those who contributed the funds to the erection of the

> building) that an occasional use of the property by a tenant at will, for purposes other than those mentioned in the deed, would work a forfeiture of the estate. To produce that effect, it must be by some permanent use different from those enumerated in the deed, such for example, as converting the building into a factory, or the land attached to it into arable land or pasture. The *grant, being for a charity, could not be forfeited for non-user, nor for misuser except under an express condition or contract;* and although, in the latter case, it may, yet it must be clearly, expressly, and strictly shown that the condition was broken; 5 Watts 493, Martin vs. McCord; 9 Barr, 433, Wright vs. Linn. The law raises every intendment in favor of a charity, against the grantor or those claiming under him; public schools intended for the children in the neighborhood are favorites in this State, and must receive the protection and support as far as is reasonable, of the public tribunals. It must be kept in view, that it is a misuser and not a non-user, which produces the forfeiture. So runs the deed. Throwing therefore, the non-user out of consideration, what is the evidence of misuser," (Italics added)

Of course, strictly speaking, the gift of the property to the State of Utah was not a charitable gift but it was motivated as a matter of civic pride, not only to the advantage of the State but likewise to the city by insuring that the Governor of the State would reside in the City, and that a suitable location for the Governor's home would be found. It is the contention of appellant that there is a possibility that the property will be used some time in the future for a site of the Governor's residence,

and as long as that possibility exists, it cuts short the possibility of reverter in favor of the city. Until that possibility is completely extinguished the special limitation in favor of the city may not arise. See Vol. 2, Miner's Institutes, p. 77, 1 Lomaxes Digest, p. 331, wherein Littleton says:

> "It is called a condition when something is given on an uncertain event which may or may not come into existence. * * *"

The city does not have reversion, it can only have as distinguished therefrom a possibility of reverter, which according to modern technical notion arises upon a grant so limited that it may last forever or may terminate upon a condition or contingency. It is only the possibility of gaining the fee again which exists in the grantor after the grant of a determinable or qualified fee. See Vol. 2, C. J.. p. 1017. See also Miner's on Real Property, (2d) 1012.

When was the possibility of reverter to the grantor to be brought to a head? The answer is: At the instant when there no longer remains the possibility of the estate remaining absolute in the grantee under the terms of the deed. That time could only arise when the State, as grantee, uses the property for some purpose other than a Governor's Mansion.

CONCLUSION

In conclusion, based upon the foregoing authorities, having in mind that the law abhores a forfeiture, it is the

contention of the appellant that the court erred in finding that the possibility of reverter has arisen, because of the fact that there is still a "possibility" (in fact a certainty) that the State of Utah will yet use the property described in Exhibit "C" for the purposes set forth therein, and that until the State of Utah attempts to use the property for some other purpose, the special limitation has not consummated itself or come to life, and that the property still belongs to and is owned by the State of Utah in fee simple determinable, and that the decision of the court below should be reversed.

Respectfully submitted,

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